

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1206-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HAKAM F. HAMDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed.*

CURLEY, J. Hakam F. Hamdan appeals from a judgment of conviction entered following his plea of guilty to one count of battery, contrary to § 940.19(1), STATS. Hamdan also appeals from an order denying his postconviction motion for sentence modification. Hamdan claims that the trial court erroneously exercised its sentencing discretion. We disagree and affirm.

I. BACKGROUND.

On August 12, 1995, Hamdan punched Rebecca E. in the right eye and threw her to the ground. A criminal complaint was filed charging Hamdan with one count of battery, contrary to § 940.19(1), STATS. During the plea proceedings, the prosecutor, pursuant to a plea agreement, recommended a sentence of nine months in jail, imposed and stayed, and eighteen months probation with counseling and costs. Hamdan pleaded guilty, but the trial court decided not to follow the prosecutor's recommendation and sentenced Hamdan to thirty days in jail, straight time. Hamdan filed a postconviction motion for sentence modification which the trial court denied. Hamdan now appeals.

II. ANALYSIS.

Hamdan claims that the trial court erroneously exercised its sentencing discretion by failing to sufficiently explain its reasoning process, and refusing to consider probation.

A. Standard of Review

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). There is a strong public policy against interference with the sentencing discretion of the trial court. *Id.* We presume that the trial court acted properly and the burden is on the complainant to “show some unreasonable or unjustified basis in the record for the sentence complained of.” *Id.* at 622-23, 350 N.W.2d at 638-39.

When sentencing, however, there must be evidence that discretion was in fact exercised and the basis of that exercise of discretion should be set forth. *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971).

“Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.*

The trial court should consider three primary factors when sentencing: the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 276, 182 N.W.2d at 519. In addition, it is within the court's discretion to consider a number of other factors including, *inter alia*: (1) any history of undesirable behavior patterns; (2) the defendant's personality, character and social traits; and (3) the defendant's remorse, repentance and cooperativeness. *State v. Tew*, 54 Wis.2d 361, 367-68, 195 N.W.2d 615, 619 (1972).

B. Trial Court's Explanation of Its Reasoning Process

Hamdan claims that the trial court erroneously exercised its discretion by failing to set forth the process of reasoning which formed the basis for its sentencing decision. We conclude that the trial court adequately explained the reasons for its decision.

During the sentencing proceedings, the following exchange occurred between the trial court and Hamdan:

THE COURT: You're not disputing the facts contained in the criminal complaint that said you did this to her, are you, sir? You did do those things, didn't you, sir? Did you do them or didn't you do them?

THE DEFENDANT: I never punched her, Your Honor.

THE COURT: What about throwing her to the ground; did you throw her to the ground?

THE DEFENDANT: I don't think I did. I can't remember.

....

THE COURT: This is called reality, not living in denial, make your admissions....Did you hit or throw her to the ground?

....

THE DEFENDANT: Yes, I did, your Honor.

Later in the proceedings, Rebecca testified that Hamdan had beaten her a number of times and had injured her jaw on one occasion, causing her to develop TMJ.¹ Hamdan testified that Rebecca's jaw was injured because he had to pry her mouth open to stop her from swallowing pills, which Rebecca said was a lie. Following Hamdan's testimony, the trial court stated "You're still in denial. You have a problem admitting that you beat this woman up." Soon after making that statement, and before making its sentencing decision, the trial court told Hamdan once more, "You still have a problem." The trial court also stated, "I look at prior acts at the time of sentencing for purposes of sentencing here."

Although the trial court could have made its reasoning more explicit, the court's statements sufficiently reveal its reasoning process. First, the court considered Hamdan's personality and character, and degree of repentance and remorse, and found that Hamdan was "in denial" and had a "problem." Second, the court considered Hamdan's prior history of undesirable behavior patterns, namely, the testimony from Rebecca that Hamdan had previously beaten her and injured her jaw. After examining these factors, the court sentenced the defendant, stating:

¹ Temporomandibular joint disorder.

How you're going to learn to stop is not through all these programs, because we all have to be law abiding, everybody's on probation, we have to know that we should not abuse alcohol and drive or use illegal drugs, all that stuff. Punishment is 30 days in jail straight time. That's your sentence for doing that to that woman, because next time when you get out, if you think about that and want to hit a woman, you'll think of me and say, you know, I got 30 days in jail for doing that to this woman, I better not do it to anybody else.

Again, although the court could have made its reasoning more clear, the court's statements reveal that it considered the character of the defendant, the gravity of the offense, and the need for public protection before fashioning an appropriate sentence. The court, which had earlier stated that Hamdan was in "denial" and had a "problem," found that Hamdan would not learn to change his behavior through a program or probation. The court then explicitly connected Hamdan's sentence with a deterrence rationale, inferably because the court had considered the gravity of the offense, and the need to protect the public from further batteries by Hamdan.

In sum, the trial court's statements make it sufficiently clear that the court considered appropriate factors and employed a reasoning process when fashioning Hamdan's sentence. Hamdan has failed to meet his burden to show that the basis of the court's exercise of discretion was not set forth.

C. Trial Court's Refusal to Grant Probation

Hamdan also claims that the court erroneously exercised its discretion by refusing to consider probation as a sentencing alternative. We conclude that the trial court properly considered probation, but rejected it in Hamdan's individual case.

Although a court may, after considering the relevant factors, refuse to grant an individual defendant probation, a uniform refusal to consider a sentence of probation for a potential offense constitutes an erroneous exercise of discretion. *See State v. Martin*, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981). Hamdan claims that the trial court, analogously to the court in *Martin*, had a preconceived policy of not considering probation as a sentencing alternative for the offense of battery. Hamdan's supports his claim by noting that the trial court's discussion of probation was very limited and contained the statement, "everybody's on probation." This evidence fails to show that the trial court had a "preconceived policy" which was "impermissibly tailored to fit only the crime and not the offender." *Id.* at 327, 302 N.W.2d at 59. Although the trial court could have more explicitly stated its reasons for rejecting probation for Hamdan, there is no evidence that its statement "everybody's on probation" denoted a refusal to consider probation in every battery case. Therefore, we conclude that the trial court properly considered, but rejected, probation for Hamdan.

In conclusion, Hamdan has failed to show an erroneous exercise of sentencing discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

